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IN THE

Supreme Court of the United States

October Term, 1960.

No. 825

CULINARY AND HOTEL SERVICE WORKERS UNION, LOCAL NO. 226, and AL BRAMLET, Secretary of said defendant organization,

Appellants and Petitioners,

vs.

EDWARD HAUGEN, JR.,

Appellee and Respondent.

Petition for a Writ of Certiorari to the Eighth Judicial District Court of Clark County, Nevada, and to the Supreme Court of the State of Nevada.

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CULINARY AND HOTEL SERVICE WORKERS UNION, LOCAL No. 226, and AL BRAMLET, Secretary of said defendant organization,

Appellants and Petitioners,

vs.

EDWARD HAUGEN, JR.,

Appellee and Respondent.

Petition for a Writ of Certiorari to the Eighth Judicial District Court of Clark County, Nevada, and to the Supreme Court of the State of Nevada.

Petitioners, Culinary and Hotel Service Workers Union, Local No. 226, and Al Bramlet, Secretary of Said Organization, pray that a Writ of Certiorari issue to review the Judgments of the Eighth Judicial District Court of Clark County, State of Nevada, and the Supreme Court of Nevada entered in the above-entitled case.

Opinions Below.

The Opinion of Department 4 of the Eighth Judicial District Court of Clark County, State of Nevada (hereinafter referred to as the District Court) is set

forth as Appendix "A". The Opinion of the Supreme Court of the State of Nevada, being Case No. 4300, filed November 18, 1960, 357 P. 2d 113, ... Nev. ....., is set forth as Appendix "B."

Jurisdiction.

On May 5, 1960, judgment was entered by the District Court (Appendix "C"). On May 12, 1960 a Stipulation between counsel was filed and approved by the District Court extending time to file a Motion for New Trial (Appendix "D"). On June 2, 1960 the District Court again extended the time in which appellants could file a Motion for New Trial to and including June 27, 1960, on the specific ground that the transcript of the trial had not been prepared by the court reporter (Appendix "E"). On June 27, 1960 the Motion for New Trial was filed. On July 22, 1960 appellants filed a Notice of Appeal. On September 30, 1960 the District Court denied appellants' Motion for New Trial on the ground it was not timely filed. On October 5, 1960 appellants filed a Motion for Relief under Rule 60(b) of the Nevada Rules of Civil Procedure. This Motion and the Motion to Strike the Notice of Entry of Judgment were denied on October 19, 1960 by the District Court. Appeals were filed on October 21, 1960 to the Supreme Court of Nevada. On November 18, 1960 the Supreme Court of Nevada rendered its Opinion dismissing appellants' appeal on the ground that it was not timely filed and denying appellants relief under Rule 60(b) of the Nevada Rules of Civil Procedure. A Petition for Rehearing was timely filed and denied on ~~November 21~~ Dec 23, 1960, without Opinion.

The jurisdiction of this Court is invoked on the following grounds:

1. By virtue of Section 1 of the XIVth Amendment to the Constitution of the United States.

2. By virtue of Title 28 U. S. C. A., Section 1257(3).

3. By virtue of 29 U. S. C., Section 160(c).

Questions Presented.

The following questions are presented to this Court:

1. Where a Judgment of a State Court is Void for Lack of Jurisdiction Over the Subject Matter and Because the Complaint Fails to State a Claim for Relief, Does Such Judgment by the State Court Deny Appellants the Protection of the Due Process Clause and the Equal Protection Clause of the XIVth Amendment to the United States Constitution?

2. May a State Court Interfere With Reasonable Restraints Imposed by a Union Upon its Members for Violating a Strike Called in the Re-Negotiation of a Labor Contract Where Said Member Fails to Exhaust the Remedies Available to Him Under the Constitution and By-Laws of the Local and International Unions?

3. Does the National Labor Relations Act Preclude a State Court From Awarding a Judgment for Damages in Favor of a Union Member Against His Union for an Alleged Interference With the Union Member's Right to Work in a "Specific Job Classification," in the Absence of Mass Picketing, Threats of Violence or Intimidation?

4. Where Excessive Exemplary Damages Are Awarded by a Trial Court Predicated Upon the Ex-

press Animosity of the Judge Against a Labor Union, Does Such Award Violate the Guarantees of the Due Process Clause and Equal Protection Clause of the XIVth Amendment to the Constitution of the United States?

5. When the Trial Judge Grants Additional Time to a Party in Which to File a Motion for New Trial Because of the Inability of the Court Reporter to Prepare a Transcript of the Proceedings Within the Time Required, Is Such Party Denied Due Process or Equal Protection of the XIVth Amendment to the Constitution of the United States When the Trial Court Subsequently Rules That Said Motion for New Trial Was Not Timely Filed, Thus Completely Preventing an Appeal or Review on the Merits?

Constitutional Provisions and Statutes and Regulations.

Constitution of the United States, Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Labor Management Relations Act, 1947, as Amended by Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. Section 151 *et seq.*

Nevada Rules of Civil Procedure:

Rule 6(b):

"When by these Rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the parties, by written stipulation of counsel filed in the action, may enlarge the period, or the court for a cause shown may at any time at its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 25, 50(b), 52(b), 59(b), (d), and (e); 60(b), and 73(a) and (g) except to the extent and under the conditions stated in them."

Rule 59(b):

"Time for motion. A motion for a new trial shall be served not later than ten days after service of written notice of the entry of the judgment."

Nevada Rules of Civil Procedure:

Rule 60(b):

"Mistakes; Inadvertence; Excusable Neglect; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2)

fraud, misrepresentation or other misconduct of an adverse party which would have heretofore justified a court in sustaining a collateral attack upon the judgment; (3) the judgment is void; or, (4) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that an injunction should have prospective application. The motion shall be made within a reasonable time, and for reasons (1) and (2) not more than six months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

Rule 73(a):

"Appeal; Procedure. (a) When and how taken. When an appeal is permitted the time within which an appeal may be taken shall be thirty days from service of written notice of the entry of the judgment appealed from. The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from service of written notice of the entry of any of the following orders made upon a timely motion

under such rules: Granting or denying a motion for judgment under Rule 50(b); or granting or denying a motion under Rule 52(b) to amend or to make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or granting or denying a motion for a new trial under Rule 59. . . ."

Rule 82:

"These rules shall not be construed to extend or limit the jurisdiction of the district courts or the venue of actions therein."

Statement of the Case.

After a one day trial held on the 31st day of March, 1960, the Trial Judge of the District Court awarded a money judgment in the sum of $1,200.00 special damages and $25,000.00 exemplary damages in favor of plaintiff and appellee, Edward Haugen, a member of appellant Union and against the defendant and appellant, Culinary and Hotel Service Workers Union, Local No. 226, and its secretary, Al Bramlet.

Appellee, hereinafter referred to as Haugen, first joined the appellant Culinary and Hotel Service Workers Union, Local No. 226, hereinafter referred to as the Union, in May of 1958. He was a bus boy. The Union represents the culinary workers of almost every hotel, restaurant, and drive-in in Las Vegas, Nevada. Shortly after joining, Haugen became sick and took a leave of absence. He returned to work in March 1959, being employed at the Lake Company doing business as Tip Top Restaurant (hereinafter referred to as Tip

Top), as a bus boy and later as a "wheel and fountain man" (one who prepares sodas and short orders.) Haugen's wife, also a union member, worked for the Tip Top as a waitress.

On March 10, 1959, a contract between the Union and the Southern Nevada Restaurant and Bartenders Association expired. Negotiations between the Association and the Union for increased wages to its members continued throughout March and April 1959, unsuccessfully. On April 21, 1959, a strike was voted by the Union and a picket line placed around the Tip Top. All Union members, including Haugen and his wife, left work on April 21, 1959. The following day, April 22, 1959, Haugen received a call from the Manager of the Tip Top, Bruce Newell, to return to work, because he had a Restraining Order from the Nevada District Court against the Union. The Restraining Order read in part:

> "It is further ordered that said defendants (Union) and each of them affected by this Order, shall not hinder or in any wise conflict with the free entry and egress of customers and employees to and from the premises of the plaintiff Tip Top Drive-In and Tel-N-Tote Drive-In."

The Union withdrew the picket line after the Order, but none of its members returned to work, with the exception of Haugen and two car hops, also Union members.

No one prevented Haugen from returning to work nor were there any threats made to him about returning to work.

Approximately one week later, the Tip Top agreed to an increase in wages and signed the contract with

the Union and all other Union members, including Haugen's wife, returned to work.

On April 30, 1959, after the contract was signed, the Union by written notice, requested Haugen to appear at the Union Hall on May 4, 1959, to answer charges that were to be filed against him.

On May 4, 1959 Haugen appeared at the meeting, admitted he had worked when the strike was still on. For this he was fined $200.00 by the Union. Similar action was taken against the two car hops who had worked during the strike.

On June 9, 1959 Haugen and the two others wrote a letter to the appellant Al Bramlet requesting a rehearing. (But there was no evidence that the letter was actually received by the Union.) No other appeal proceedings were taken by Haugen.

On June 20, 1959 Haugen was fired by the Manager of the Tip Top. Haugen's wife, continued to work for the Tip Top.

Haugen did not pay his fine or make any effort to do so. In June 1959 he sent in $12.00 by registered mail. This was applied to his fine.

Between June and September 1959, Haugen went to the Union who gave him Work Slips but not for his "trade classification" (wheel and fountain man). There were only four establishments in Las Vegas that employed wheel and fountain men, and no such jobs were available.

Haugen was notified by mail that unless he paid his dues, he would be suspended on September 10, 1959, according to Section 50 of the International Constitution.

Haugen was offered other jobs as fry cook and exhibition cook through the Union but refused them.

He was never denied a Work Slip by the Union and on March 8, 1960, was given one to work at the Star Dust Hotel when an opening as a wheel man became available.

Haugen's Complaint filed on September 16, 1959 alleges in substance that he was unjustly fired by the Union and that they caused him to be ostracized.

The evidence disclosed no acts of violence, threats, intimidation or other wrongful conduct by the Union. The only evidence adduced on this subject was through Newell, the Manager of the Tip Top, who testified that during the picketing, which lasted 24 hours, he received anonymous phone calls to settle the dispute.

The acts complained of by Haugen are alleged to have occurred weeks after the dispute had been settled.

At the conclusion of the trial, it was submitted. On April 8, 1960 the Court entered its Opinion awarding judgment to Haugen for $25,000.00 exemplary damages, $1,188.00 loss of earnings, and $12.00 for the dues paid.

Judgment was entered May 5, 1960 and a Notice of Entry of Judgment filed the same day. On May 12, 1960 a Stipulation was filed extending the time to file Motion for New Trial to June 6, 1960. On June 2, 1960 it was again extended by the Court to June 27, 1960 because of the inability of the court reporter to prepare the transcript.

At the hearing on the Motion for New Trial, and again at the hearing on the Motion to set aside the

judgment under Rule 60(b) of the Nevada Rules of Civil Procedure, the appellants contended:

1. That the Court had no jurisdiction over the subject matter of the action because of the exclusive jurisdiction of the National Labor Relations Board.

2. That the Complaint did not state a claim for relief.

These issues were again raised in appellants' Appeal Briefs.

None of the issues were considered by either of the Nevada Courts, on the theory that the Motion for New Trial was not timely made and thus nothing was before the Court.

The acts which violated the National Labor Relations Act were called to the Court's attention both in the Motion for Relief under Rule 60(b) and in the Opening Brief for Appellants.

Reasons for Granting the Writ.

1. None of the questions presented in this case has been expressly decided by this Court. The factual situation involved in the case at bar appears to be a matter falling within the sphere of this Court's rulings in the case of *International Association of Machinists v. Gonzales,* 356 U. S. 617, and *United Automobile Workers v. Russell,* 356 U. S. 634, and the more recent Decision of this Court in *San Diego Building Trades Council v. Garmon,* 359 U. S. 236, 79 S. Ct. 773, 3 L. Ed. 775. This Court, in reversing the ward for damages granted in the *Garmon* case, *supra,* said, at page 239:

"We again granted certiorari, 357 U. S. 925, to determine whether the California Court had jurisdiction to award damages arising out of peaceful union activity which it could not enjoin."

and, at pages 241-242, the Court said:

"In determining the extent to which state regulation must yield to subordinating federal authority, we have been concerned with delimiting areas of potential conflict; potential conflict of rules of law, or remedy, and of administration. . . . We have necessarily been concerned with the potential conflict of two law-enforcing authorities, with the disharmony inherent in two systems, one federal, the other state, of inconsistent standards of substantive law and differing remedial schemes. But the unifying consideration of our decisions has been in regard to the fact that Congress has entrusted administration of the labor policy to the National to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience; . . ."

and, the Court said, at page 247:

"The obligation to pay compensation can be, indeed is designed to be, a potential method of governing conduct and controlling policy. Even the State's salutary effort to redress present wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme."

2. The instant decision and the effect of the action of the Nevada District Court and of the Nevada Su-

preme Court conflicts in principle with the authority established by the *San Diego Building Trades Council v. Garmon, supra.*

The instant case is also in conflict with the Decisions established by the National Labor Relations Board and by the case of *Union Starch and Refining Co. v. N. L. R. B.*, 186 F. 2d 1008, 27 A. L. R. 2d 629.

3. That these questions are of utmost importance to the practicing bar and to the economy of the country probably needs no proof. The volume of litigation and legal writing engendered stands as a monument to the confusion which exists among lawyers and litigants and which will exist until this Court puts these issues to rest.

This confusion is not merely academic; the questions have enormous practical consequences for labor relations in interstate commerce.

4. If a state court has no jurisdiction because of the pre-emption by federal labor legislation, then any judgment rendered by the state court would be void and subject to attack at any step of the proceedings. *Pennoyer v. Neff*, 95 U. S. 714; *Scott v. McNeal* (1893), 154 U. S. 34; 14 S. Ct. 1008.

5. Another impelling reason for the Court granting this Petition is because great confusion exists in the field of union activity in determining the extent to which the union can impose reasonable regulations and penalties upon its members for violating decisions rendered by the union to carry out legitimate and lawful union objectives. Almost every labor union in the United States has grave concern because of the confusion engendered by the Decisions of various state courts

allowing punitive damages to be recovered against the union where the union has made a reasonable effort to have its member abide by the will of the majority of union members. If unions can be subjected to the constant pressure imposed by the fear of having punitive damages rendered against them, complete chaos will result and the effectiveness of union activity will be destroyed. As Chief Justice Warren said in his Dissenting Opinion in the *United Automobile Workers v. Russell, supra,* case:

> "The element of deterrence inherent in the imposition or availability of punitive damages for conduct that is an unfair labor practice ordinarily makes such a recovery repugnant to the Federal Act. The prospect of such liability on the part of a union for the action of its members in the course of concerted activities will inevitably influence the conduct of labor disputes. There is a very real prospect of staggering punitive damages accumulated through successive actions by parties injured by members who have succumbed to the emotion that frequently accompanies concerted activities during labor unrest. This threat could render even those activities protected by the Federal Act too risky to undertake."

The differences between the case at bar and the *Russell* case are as follows:

(1) Here there was no interference with plaintiff's right to work during the strike.

(2) There was no violence, intimidation, or mass picketing which prevented plaintiff from working.

(3) The Union activity merely imposed a fine upon plaintiff for working during the called strike.

6. Unless some standard is established limiting the amount of damages that can properly be awarded, it is possible that the union treasuries could be depleted by collusion between certain unethical union officials and certain unethical members, thus destroying one of the fundamental objectives which Congress seeks to protect, to wit, the protection of union funds and the use of said funds for the benefit of all union members.

7. This Court has stated that the type of conduct in which state courts would be allowed to grant compensation was conduct marked by "violence and imminent threats to public order" and "intimidation and threats of violence."

The instant case is devoid of any such activity and the record is abundantly clear as to the absence of any violence.

The District Court in rendering its Decision, erroneously found threats of violence and these erroneous findings and the express animosity of the trial court towards the defendant labor union prevented the defendant and petitioners from having a fair trial. The award made by the trial Court was predicated upon this express bias and prejudice and violated the guaranties of the due process clause and the equal protection clause of the XIVth Amendment to the Constitution of the United States.

The total testimony with regard to any violence or threats is set forth in Appendix "F".

8. Where the action of the trial court is such as deprives a party from having a full and fair determination and prevents him from seeking an appeal on the merits, such action by the trial judge is a denial

of due process and equal protection granted by the XIVth Amendment. This Court has held, in *Cochran v. Kansas* (1942), 316 U. S. 255, 62 S. Ct. 1068, 86 L. Ed. 1453, and in the recent case of *Burns v. State of Ohio*, 360 U. S. 252, 79 S. Ct. 1164, 3 L. Ed. 1209, that where appeal procedures have been established, they cannot be thwarted by the action or conduct of state officers.

In the instant case, a Stipulation was entered into between counsel and approved by the court to extend the time in which to file the Motion for New Trial to the 6th day of June, 1960, as seen in Appendix "D". The time was again extended by the trial court's order on the grounds that the reporter's transcript had not yet been prepared; see Appendix "E".

9. Although the Nevada Rules of Civil Procedure were formulated after the Federal Rules of Civil Procedure, modifications made in Rule 6(b) of the Nevada Rules of Civil Procedure present fundamental differences between the Federal Rules and the Nevada Rules. One prime difference is that the Federal Rules are jurisdictional. The Rules as adopted by the Supreme Court of Nevada are not intended to destroy the fundamental common law jurisdiction of the district courts. See *Green v. Hooper*, 167 Pac. 23, and *Thorpe v. Clemmons*, 142 Pac. 1115, and Rule 82. In both the *Green* and *Thorpe* cases, *supra*, the Nevada Supreme Court held that the time limits established for the filing of a Motion for New Trial were not jurisdictional and the trial court could extend the time under a proper showing.

The rules of fundamental fairness seem to cry out that petitioners have been deprived of the protection

and guarantees granted under the XIVth Amendment to the Constitution of the United States by the action of the State Court in its ruling that defendants' Motion for New Trial was not timely filed since the failure to file said Motion for New Trial resulted from the petitioners' reliance upon the trial court's order.

This Court has repeatedly held that the action of state courts and judicial officers acting in their official capacity is to be regarded as action of the state within the meaning of the XIVth Amendment to the Constitution of the United States. *Shelley v. Kraemer* (1948), 334 U. S. 1, ... S. Ct. ....., ... L. Ed. .....

Conclusion.

For the reasons given above, petitioners pray this Court to issue a Writ of Certiorari. The facts of the instant case cry out that an injustice has been done and that the constitutional rights of all members of petitioner's union have been violated by the state court's action. The importance in having a clear-cut determination as to the extent to which unions may impose reasonable regulations upon its members is becoming more urgent and is necessary to carry out the intent of Congress in its efforts to regulate the affairs of unions.

Respectfully submitted,

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APPENDIX "A."

Decision of the Eighth Judicial District Court, State of Nevada.

In the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark.

Edward Haugen, Jr., Plaintiff, vs. Culinary and Hotel Service Workers Union, Local No. 226, and Al Bramlet, Secretary of said Defendant Organization, Defendants.

Case No. 98960. Dept. No. 4.

Filed Apr. 8, 1960.

This action arises out of plaintiff's discharge by his employer the Lake Company, doing business as Tip Top Drive Inn in the City of Las Vegas, County of Clark, State of Nevada. The plaintiff complains and the Court finds that on the 20th day of June 1959 and for some time prior thereto the plaintiff was regularly employed by the said Lake Company, a corporation doing business as Tip Top Drive Inn, and that his salary for services rendered as a fountain and wheel man were $18.00 per day for an eight-hour day 48 hours per week, and the Court finds that the plaintiff was held in esteem by his employer and those with whom he worked. The Court finds that the defendants and each of them contrived maliciously and wrongfully to injure the plaintiff and caused him to be discharged from his employment on June 20, 1959. The Court, further finds that the plaintiff unconditionally tendered payment of all union dues due and owing to the Culinary and Hotel Service Workers Union, Local 226 and that the defendants and each of them wrong-

fully applied a $12.00 payment of union dues to apply toward payment of a so-called fine assessed against the plaintiff in the sum of $200.00. The Court finds that the defendants and each of them conspired wrongfully to cause the plaintiff to be fired for an alleged breach of the rules of the defendant union organization and levied a fine against the plaintiff which said fine was unjust and not levied in accordance with the bylaws of the said organization, and that the defendants and each of them have refused to give the plaintiff a rehearing on said matters and continued to demand payment of said alleged fine of $200.00. The Court finds that the defendants and each of them did make threats, intimidations, and representations to the officers of the said Lake Company by causing or knowingly permitting its members to call one William Bruce Newell, manager of said Tip Top Drive Inn and did threaten the said William Bruce Newell to the point that the said William Bruce Newell did apply for and receive a permit from the Sheriff's Department of the County of Clark, State of Nevada to carry a gun for his protection against intimidations and threats. The Court finds that the defendants' acts aforesaid in interfering with the exercise of plaintiff's lawful right to work did continue to do harassment to the plaintiff until the early part of March 1960, to wit, March 8, and that from the period of June 20, 1959 to and including March 8, 1960 the plaintiff was prevented from pursuing his trade at the hands of the said defendants and each of them. The Court finds that from June 20, 1959 to the date of the commencement of this action on September 16, 1959 the plaintiff lost as a result of the activities of the defendants and each

of them the sum of $1,188.00. The Court finds that the plaintiffs rights were invaded by the defendants and each of them under the Consitution and laws of the United States and the Consitution and laws of the State of Nevada in that they and each of them deprived plaintiffs of his rights to secure enjoyment of employment without molestation of any kind in that in the particular job classification of the plaintiff that there were no available jobs in Clark County, State of Nevada, that in order to fill the vacancy created by the defendants' insistence upon the firing of plaintiff June 20, 1959 the plaintiff was deprived of a right to follow his usual occupation and caused to lose a job in which he was advancing in responsibility and earnings. The evidence in this case reveals that on April 22, 1959 the Lake Company, a limited co-partnership, doing business as Tip Top Drive Inn and Tell 'n' Tote Drive Inn brought an action against the Culinary Workers Local Number 226, and association, and Al Bramlet, et al, Case Number 96264 in which said action on April 22, 1959 a temporary restraining order was issued in Department One by the Honorable David Zenoff, wherein and whereby the "defendant Culinary Union, Local 226 and each and every member thereof including Al Bramlet and Ed Duke Crowe, be, and they and each of them are hereby enjoined and restrained from picketing the premises of the Plaintiff, known and designated as Tip Top Drive Inn and Tell 'n' Tote Drive Inn located at Fifth and Charleston Streets and Fourth and Charleston Streets respectively at and within the City of Las Vegas, and from any wise inducing or causing others to induce any person to picket said premises as unfair to organized labor at the points and

places described in the City of Las Vegas, County of Clark, State of Nevada until further order of this Court. It is further ordered that said Defendants and each of them effected by this order, shall not hinder or in any wise conflict with the free entry and egress of customers and employees to and from the premises of the plaintiff, Tip Top Drive Inn and Tell 'n' Tote Drive Inn."

The testimony reveals and the Court finds that the defendants and each of them were contemptuous of said restraining order; that the defendants and each of them failed and refused to recognize or honor said restraining order and the Court finds that the plaintiff after reading the restraining order which was posted upon the premises of the Tip Top Drive Inn to the extent that the plaintiff was familiar with the contents thereof, to the extent that, "said defendants and each of them effected by this order, shall not hinder or in any wise conflict with the free entry and egress of customers and employees to and from premises of the plaintiff . . ."; that as a result of plaintiff's familiarity with said injunction he did continue to work; that as a result thereof the defendant Culinary Workers Union, Local 226 over the signature of the defendant Al Bramlet on April 30, 1959 did order the plaintiff as follows:

"Dear Brother Haugen: You are hereby notified to appear before the next meeting of the Executive Board of Culinary Workers Union, Local No. 226 to answer to such charges as may be preferred against you. This Executive Board meeting will be held Monday, May 4, 1959 at 4:00 P.M. in the offices of the

Culinary Workers Union at 1630 South A. Street. Fraternally, Al Bramlet," That at the said time and place the plaintiff did present himself to a meeting at which, without the filing of any charges whatsoever against the plaintiff and in violation of the by-laws of said defendant Culinary Workers Union the plaintiff was fined the sum of $200.00. Article 11 of the by-laws of the said Union read as follows:

"*Charges and the Grievance Committee* Section One. Charges against a member must be in writing and presented at a meeting of the Union or at a meeting of the Executive Board. The charges must be in duplicate and describe the offense or offenses distinctly, giving the time and place of the alleged violation and signed by the members making the charges. If more than one charge is made, each must be complete, so they can be acted on separately and independently. Proper documents, affidavits or exhibits to verify the charges must be submitted . . ."

No charges were ever preferred against the plaintiff save and except the letter of April 30, 1959 in which no charges whatever were stated. The defendant Al Bramlet, on cross-examination testified as follows:

"From the time of service of the restraining order to the time of the settlement of the law suit number 96264 I instructed the members and the employes of the Tip Top of the injunction. The members were not told not to go back to work, only that the contract had not been signed. The employes used their own judgment, but plaintiff was fined $200.00 for allegedly crossing a picket line which did not exist because the contract had not been signed."

Al Bramlet further testified that the meeting of May 4, 1959 was not even a meeting of the executive board; that there was no need for filing charges against the plaintiff because he pleaded guilty. This is preposterous. The overwhelming abundance of evidence here is that the plaintiff acted in good faith and in accordance with the injunction or temporary restraining order that had been issued against the defendants and each of them. The entire matter is a farce conducted in a manner in which arrogant labor leaders and union officials conduct their business, and in absolute violation of the rights of the members of said union. This high-handed procedure has become very common as the whole public knows or should know from the reports of the Senate Racket Committee investigating labor mal practices. This sort of procedure becomes ridiculous in light of Article 11 of the constitution of the union.

The evidence reveals through the witness Willaim Bruce Newell that, "I was contacted by Ed Duke Crowe, the union's business agent." He stated, "Duke told me that Edward Haugen, Jr., the plaintiff, had not paid the $200.00 fine and that 'they' would want to replace him." He told Mr. Crowe that he had no replacement. He said he would get one. "I then received a call from a woman saying Al Bramlet wanted to see me," Newell testified, "So, I set up an appointment. The meeting was on June 18, 1959 at the office of Al Bramlet. Bramlet said he had a fountain man from Los Angeles to replace the plaintiff and would I interview him. I asked Mr. Bramlet if this was the man to replace the plaintiff. He nodded his head affirmatively. Bramlet then stated that the best way to fire Ed would be to tell him his work was un-

satisfactory and the other employes in my establishment were unhappy. I made a report to the Nevada Unemployment Division in which I reported that the plaintiff was fired because his work was unsatisfactory and the employes were unhappy and at the request of the Culinary Workers Local Number 226."

Mr. Newell further testified that the replacement of the plaintiff was a real problem; that he was a good man that he had started with the company at $13.00 per day; that he had advanced to the point of making $18.00 a day and that the day before he was fired, "I advised the plaintiff that the following week I was placing more responsibility on him and raising his pay to $20.00 per day," and that, "during the strike threats were made. We were harrassed by telephone calls saying if we didn't settle the strike they would run me out of town. I don't know who called. We were called about 20 times. The calls came all around the clock."

Al Bramlet, of course, and Ed Duke Crowe, of course, denied having any knowledge of any such conduct, but be that as it may, this type and sort of conduct must be condoned by the labor leaders of this union as a method of coercion no matter whose rights may be violated.

The above and foregoing is quoted at length; however, there is much more testimony in this case to show malice and ill will existing between the plaintiff and the defendants; for instance, the plaintiff testified that he was handed a letter dated April 30, "notifying me to appear to answer any charges which may be preferred. I was handed no other charges or documents. I went to Al Bramlet's office at 4:00 P.M. May 4th. There

were others in Al's office. There were no charges in writing. But I was told I worked behind the picket line. I mentioned the injunction. I was thereupon fined $200.00 and Al said the injunction was of no force and effect and that if he could he would make the fine $500.00. I went back to work after the hearing and I wrote the union demanding a re-hearing. At the end of May I was called by Al Bramlet and asked why the fine had not been paid. The reason was I had asked for a re-hearing".

A letter addressed to Al Bramlet on June 9 and signed by Dorothy Kennedy, Genevieve Tobin and Edward Haugen "respectfully" requested that "they and each of them, be given a rehearing before the proper board, relative to the matter upon which the Culinary Union assessed a fine against each of them in the amount of $200.00."

The plaintiff testified that he was fired on June 20, 1959, that on the 25th of June, 1959 William Bruce Newell in a conversation with the plaintiff stated, "I am sorry, but I would not want to talk about it." "I confronted him with facts I had learned," the plaintiff went on, "Namely, there was a document on file at the employment office that I had been fired by union orders. Mr. Newell told me he had to do it. My dues for June were paid, and on September 2nd I sent a money order for $12.00 for which the union sent me a bill for dues. I paid the $12.00 and was notified that the $12.00 had been applied against the fine and my dues were delinquent and I was suspended from the union."

Such high-handedness cannot be tolerated in a society in which a democratic form of government purpor-

tedly exists. To permit conduct of this kind would indicate that democracy has lost its touch and that thousands of people under union control have this sort of dictatorship to live with and the situation seems to become worse as time goes on. There is little democracy attached to such conduct which violates all rules and regulations of the association itself. That there is malice existing by the defendants against plaintiff is putting it mild.

The plaintiff prays for judgment in the amount of lost wages in the sum of $1,188.00 and for exemplary or punitive damages in the sum of $25,000.00, his costs of suit incurred and for such other and further relief as to the Court may seem proper. Judgment may be granted plaintiff against the defendants and each of them as prayed. And under the last category plaintiff is to have judgment against the defendant Culinary Workers Union for the sum of $12.00 paid as and for union dues which was reverted to part payment on a so-called fine. Plaintiff may amend his complaint to conform to the findings herein made and counsel for the plaintiff will prepare findings of fact and conclusions of law.

Let judgment enter accordingly.

Dated this 8th day of April, 1960.

George E. Marshall
District Judge.

APPENDIX "B."

Opinion of the Supreme Court of the State of Nevada.

In the Supreme Court of the State of Nevada.

Culinary and Hotel Service Workers Union, Local No. 226, and Al Bramlet, Secretary of Said Defendant Organization, Appellants, v. Edward Haugen, Jr., Respondent. No. 4360.

Filed November 18, 1960.

Appeal from Eighth Judicial District Court, Clark County; George E. Marshall, Judge, Department No. 4.

W. Albert Stewart, Jr., of Las Vegas, and Morris Sankary, of San Diego, California, for Appellants.

Franklin Rittenhouse, of Las Vegas, and McNamee & McNamee, of Las Vegas, for Respondent.

On Motion to Dismiss Appeal.

Appeal Dismissed.

By the Court, Badt, J.:

Respondent has moved to dismiss the appeal of appellants upon the grounds (1) that the notice of appeal was not filed within the time prescribed by NRCP; (2) that the record of appeal was not filed or docketed in time; and (3) that the opening brief of appellants was not filed in time.

As we are of the opinion that the motion to dismiss must be granted upon the first ground, the untimely filing of the notice of appeal, the second and third grounds of the motion, need not be considered.

Written notice of the entry of judgment was served and filed May 5, 1960. Notice of appeal was filed July 22, 1960. On May 12, 1960 the parties signed a stipulation extending the time to move for new trial to June 6, 1960. Such stipulation was approved by the court. On June 2, 1960 the trial court entered an ex parte order extending time to move for new trial to June 27, 1960, and on the last-named date the motion for new trial was filed. On July 19, 1960 plaintiff moved the district court to strike the defendants' motion for new trial. No order has been made by the district court granting or denying the motion for new trial or granting or denying the motion to strike the motion for new trial.

The rules involved in the present motion to dismiss the appeal are Rules 59(b), 73(a), and 6(b), NRCP. Rules 59(b) and 73(a) are respectively as follows:

"Rule 59(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after service of written notice of the entry of the judgment."

"Rule 73(a) When and How Taken. When an appeal is permitted the time within which an appeal may be taken shall be 30 days from service of written notice of entry of the judgment appealed from. The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from service of written notice of the entry of any of the following orders made upon a timely motion under such rules: . . . granting or denying a motion for a new trial under Rule 59. . ."

Rule 6(b), concerning the enlargement of time, reads as follows—the italicized clause appearing only in the Nevada rule but not in the federal rule:

"Rule 6(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, *the parties, by written stipulation of counsel filed in the action, may enlarge the period, or* the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 25, 50(b), 52(b), 59(b), (d) and (e), 60(b), and 73(a) and (g), except to the extent and under the conditions stated in them." In all other respects the Nevada Rule 6(b) is identical with the Federal Rule 6(b).

Our Rule 6(b), in identical wording with Federal Rule 6(b), limits the right of the court to enlarge the time for filing motion for new trial or notice of appeal in the following words: "* * * but it may not extend the time for taking any action under rules 59(b) [motion for new trial] * * * and 73(a) [notice of appeal]."

If the appellants' motion for new trial was timely filed, then, in the absence of any notice given of the order of court denying same, their appeal was timely filed. If the motion for new trial was not timely filed, it did not toll the running of time within which to

file the notice of appeal from the judgment. So much is clear. Our only concern, then, is whether the motion for new trial was timely filed.

The federal courts have on numerous occasions held that under the federal rule the court was without jurisdiction to extend the time for filing motion for new trial. Raughley v. Pennsylvania Railroad Company, 230 F. 2d 387; John E. Smith's Sons Co. v. Lattimer Foundry & Mach. Co., 19 F. R. D. 379; Safeway Stores v. Coe, 136 F. 2d 771; 1 Barron and Holtzoff, Federal Practice & Procedure, § 214, p. 785.

Appellants, however, seek to distinguish these cases by reason of the difference between the federal rule and the Nevada rule and call attention to the fact that while under the federal rule authority is given only to the court and not to the parties, by stipulation, to enlarge time for the performance of necessary acts under the rules, under the Nevada statute the parties may likewise by stipulation extend time. Appellants call attention further to the fact that in the present instance the parties did by stipulation extend the time, and that the prohibition against extension of time for filing motion for new trial and for filing notice of appeal applies only to the court and not to the parties. This, however, under the record, cannot avail appellants. Since notice of judgment was served May 5, 1960 and since the parties stipulated for extension of time for filing motion for new trial to June 6, 1960 (and in this opinion we do not find it necessary to pass upon the validity of such extension by stipulation), the extension granted (or attempted to be granted) by stipulation expired June 6, 1960. The filing of the motion for new

trial on June 27, 1960 can find justification only under the ex parte order of the court filed June 2, 1960 and not under the stipulation of the parties.

Accordingly, it is clear that there was not a *timely* motion for new trial and consequently no termination of the running of the time for appeal, and respondent's motion to dismiss the appeal must be granted.

The notice of entry of judgment, the receipt of the copy of such notice, the findings of fact and the conclusions of law, and the judgment all bore date May 5, 1960. In all of these instruments the month, April, had been corrected by lining the same out with the typewriter and inserting the word "May." Appellants contend that such correction, thus made without the clerk's notation of the change made before filing, is contrary to the requirements of Rule 19 of the Rules of the District Court. While compliance with the district court rule (which also contains a requirement that all pleadings and documents intended for the district court files shall be on paper known as "legal cap" of good quality) is entitled to the encouragement of this court, we are unwilling to say that the violation thereof (if the correction described constituted an "interlineation" in violation of the rule) destroyed the effectiveness of the notice.

Appellants further contend that Rule 6(b) to the effect that the court "may not" extend the time for filing motion for new trial or for filing notice of appeal is permissive and not mandatory and that the district court was therefore authorized in its discretion to extend the time. Appellants refer to Rule 2(8) of the Supreme Court and 2(6) of the Rules of the District Court, both of which define "shall" as manda-

tory and "may" as permissive. It does not logically follow, however, that the requirement that the court "may not" extend the time is anything but prohibitive. John E. Smith's Sons Co. v. Lattimer Foundry & Mach. Co., supra, Safeway Stores v. Coe, 136 F. 2d 387.

While this court has often expressed its adherence to hearing appeals on the merits rather than dismissing the same on technical grounds, it cannot do so in absence of compliance with the jurisdictional requirement for filing notice of appeal within the time limited by the rules. Rogers v. Thatcher, 70 Nev. 98, 255 P. 2d 731.

The appeal from the judgment is hereby dismissed.

On Subsequent Proceedings by Appellant

The motion to dismiss the appeal above disposed of was ordered submitted October 3, 1960. The opinion was in process of being signed and filed when, on October 28, 1960, appellants filed a document entitled "New Record on Appeal." Although the foregoing opinion notes that the defendants' motion for new trial and the plaintiff's motion to strike the motion for new trial had never been disposed of by the trial court, the new record on appeal shows that on September 30, 1960, the trial court filed an opinion and decision granting plaintiff's motion to strike defendants' motion for new trial. The trial court's opinion is almost identically along the lines of this court's foregoing opinion. The new record includes a notice of appeal from such order, "and from said order if and to the extent that said order can be considered and treated as an order denying plaintiff's motion for a new trial." Such no-

ice is dated and filed October 4, 1960. From the new record it also appears that on October 5, 1960 defendants moved for relief from the judgment under Rule 60 on the ground of mistake, inadvertence, surprise, excusable neglect, misconduct on the part of plaintiff, and on the ground that the judgment is void. This was supported by affidavit reciting the same facts as to the stipulation and order extending time for motion for new trial, etc., and the reliance of the defendants thereon, as disposed of in the foregoing opinion. It further appears that an affidavit in opposition was filed on October 7, 1960, rejecting such claim. The new record also contains a notice of appeal, dated October 21, 1960, from the court's order denying defendants' motion to strike plaintiff's notice of entry of judgment. It also contains a notice of appeal filed the same date from the court's order denying defendants' motion for relief under Rule 60.

It would be futile to put the parties to the necessity of further briefs on the merits or for further motions supported by briefs on the issues raised by the three new notices of appeal. With one exception, all issues have been disposed of in the foregoing opinion. The only exception has to do with the appeal from the court's denial of relief from the judgment under Rule 60. Not only was this largely within the court's discretion, but we do not see how the court could have reached any other conclusion than it did.

It is therefore further ordered that the appeal from the trial court's order granting the plaintiff's motion to strike defendants' motion for new trial and the defendants' appeal from the court's order denying their motion to strike the notice of entry of judgment and the defendants' appeal from the court's order denying the defendants' motion for relief under Rule 60 be, and each of such appeals is, dismissed.

Pike, *J.*, and Wines, *D. J.*, concur.

McNamee, *C. J.*, being disqualified, the Governor commissioned Honorable Taylor H. Wines, Judge of the Fourth Judicial District Court, to sit in his place.

Note—These printed advance opinions are mailed out immediately as a service to members of the bench and bar. They are subject to modification or withdrawal possibly resulting from petitions for rehearing. Any such action taken by the court will be noted on subsequent advance sheets.

C. R. DAVENPORT, *Clerk.*

APPENDIX "C."

Judgment of the District Court.

In the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark.

File No. 98960.

Filed May 5 10:01 AM '60 Helen Scott Reed, Clerk. By Ann Miller, Deputy.

Edward Haugen, Jr., Plaintiff, vs. Culinary and Hotel Service Workers Union, Local No. 226, and Al Bramlet, Secretary of said Defendant Organization, Defendants.

Judgment

This cause came on regularly for trial before the Court, sitting without a jury on the 31st day of March, 1960, McNamee & McNamee, by Franklin Rittenhouse, appearing as counsel for plaintiff, and VeNoy Christoffersen, appearing as counsel for defendants, and the Court having heard the testimony and having examined the proofs offered by the respective parties, and the Court being fully advised in the premises, and having filed herein its findings of fact and conclusions of law, and having directed that judgment be entered in accordance therewith; now, therefore, by reason of the law and the findings aforesaid:

It Is Hereby Ordered, Adjudged and Decreed that Edward Haugen, Jr., the plaintiff, do have and recover of Culinary and Hotel Service Workers Union,

Local No. 226 and Al Bramlet, Secretary of said Culinary and Hotel Service Workers Union, Local No. 226, the defendants, the sum of $26,200.00 with interest thereon at the rate of 7% per anum until paid, together with the plaintiff's costs and disbursements incurred in this action.

Dated this 5th day of May, 1960.

George L. Marshall,
District Judge.

Submitted by:

McNamee & McNamee,
By Franklin Rittenhouse
310 Fremont Street
Las Vegas, Nevada
Attorneys for Plaintiff.

APPENDIX "D."

Motion for New Trial.

File No. 98960.

Filed May 12 9:35 AM '60 Helen Scott Reed, Clerk By Lucille Bunyard Deputy.

In the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark.

Edward Haugen, Jr., Plaintiff, vs. Culinary and Hotel Service Workers Union, Local No. 226, and Al Bramlet, Secretary of said Defendant Organization, Defendants.

Stipulation

It is hereby stipulated by and between the parties hereto that the Defendants may have to and including June 6, 1960 to file a Motion for New Trial in the above entitled action.

Dated this 12 day of May, 1960.

McNamee & McNamee
By Franklin Rittenhouse
310 Fremont Street
Las Vegas, Nevada
Attorneys for Plaintiff.

VeNoy Christoffersen,
128 South Fourth Street
Las Vegas, Nevada
Attorney for Defendants.

Approved this 12th day of May, 1960.
George E. Marshall
District Judge.

APPENDIX "E."

Motion for New Trial.

In the Eighth Judicial District Court of the State of Nevada in and for the County of Clark.

File No. 98960.

Filed June 2 9:54 AM '60, Helen Scott Reed, Clerk. By Ann Miller, Deputy.

Edward Haugen, Jr., Plaintiff, vs. Culinary and Hotel Service Workers Union, Local No. 226, and Al Bramlet, Secretary of said Defendant Organization, Defendant.

Order

Upon application of VeNoy Christoffersen, Attorney for the Defendant herein, and good cause appearing therefor, in that the transcript of the trial has not been prepared to date,

It Is Hereby Ordered that the Defendant may have to and including the 27th day of June, 1960, to file a Motion for a New Trial, in the above entitled action.

Dated this 2nd day of June, 1960.

George E. Marshall,
District Judge.

VeNoy Christoffersen
128 South Fourth Street
Las Vegas, Nevada
Attorney for Defendant.

Receipt of Copy of the above Order is hereby acknowledged this 2nd day of June, 1960 McNamee & McNamee,
By Franklin Rittenhouse
Attorneys for Plaintiff.

APPENDIX "F."

Q. You never said that to the union?

A. No.

Q. Did you request any arbitration with the union as to firing these people under your contract?

A. No, I did not, sir.

Q. Did you terminate the other two people?

A. No, sir, I didn't terminate the other two. The other two quit. One quit before Mr. Haugen was let go and the other one quit right after he was let go.

Q. Of their own volition.

A. Of their own free will and accord, yes, sir.

Q. How long did you then work for the Tip Top Drive-in?

A. From November of 1958 through August the 23rd, 1959.

Q. You were terminated then in August of 1959?

A. Right, sir.

Q. Were you terminated in August of 1959 because of the way you handled the strike situation previously with the Culinary Union?

By Mr. Rittenhouse: Objected to, your Honor, as calling for a conclusion of this witness, and also it's beyond any issue whatever.

By the Court: The objection is sustained.

By Mr. Christoffersen: Q. Were any threats of any kind made to you by anyone connected with the union if this employee or the other employees were not replaced?

A. Not in the individual case of Ed Haugen or the two girls, but, however, during the strike we definitely were, yes.

Q. Were any threats made to you?

A. Yes, myself and my family.

Q. Were any threats made to you relative to forcing you to discharge anybody?

A. Oh, no, sir.

By The Court: I want to know what threats were made to you, Mr. Newell.

By the Witness: Yes, during the strike, your Honor, as a matter of fact, we had harrassing phone calls to the house threatening to run me out of Las Vegas, Nevada if we didn't settle the strike.

By the Court: Do you know anybody who called you?

By the Witness: No, sir, I sure don't. I had the calls. My wife had them, and my children had them, day and night.

By the Court: How was that strike settled?

By the Witness: By, I would say, a strike, the injunction, and a peaceful settlement by arbitration and negotiation.

By the Court: It went to arbitration?

By the Witness: Arbitration or negotiation.

By the Court: It was finally negotiated out and the action dismissed?

By the Witness: Right, sir.

By the Court: And it was during this period of time that you were harrassed?

By the Witness: Right.

By the Court: About how many times do you know that you were called?

By the Witness: I would say approximately around 20 times, your Honor, strictly all telephone calls.

By the Court: Any particular time of the day or night?

By the Witness: No, it was an around the clock deal, not any certain time. As a matter of fact, had it continued we would have had recordings of it.

By the Court: You do have recordings of it?

By the Witness: I say if it had continued we would have had recordings.

By the Court: Did you report it to the authorities?

By the Witness: No, it was never reported to any authorities. It was kept within our own organization.

By the Court: That's all.

By Mr. Christoffersen: Q. You say you don't know who made these calls?

A. No.

Q. Were they made during the time the picket line was on, when were they made?

A. Yes.

Q. The picket line was on one day, was it not?

A. Yes, the picket line was actually on one day, however, the employees were not allowed to come back for quite some time after the original strike. When that injunction was put in force there was only three employes that came back out of all the employes who work on the premises. That continued for approximately about a week after that.

Q. It was during this time?

A. Yes, it was, definitely. I would like to say, your Honor, I made a mistake on that. I went to Mr. Leypoldt the sheriff of Clark County to get a permit to carry a gun. As a matter of fact, I forgot all about

that. I carried a gun for a good week in my car and for the protection of my family. I take that back; it was reported to the authorities. I assure you I would have used the gun.

Q. Mr. Newell, you did send a statement to the Nevada Employment Security Department that you terminated Mr. Haugen because of unsatisfactory work, did you not?

A. Yes, I definitely did, sir.

Q. And you state now that that wasn't true?

A. No, that was true, I definitely, I made a statement; it's in my writing, it would have to be.

Q. You state now that that statement that you did make is not true?

A. What statement is that, sir?

Q. That you didn't terminate him because of unsatisfactory work?

A. That it was not true or that it was true? You are trying to confuse me, so I will try to confuse you, sir.

Q. I am not trying to confuse you, Mr. Newell, if you'll just wait a minute I'll try and get myself so you